SUPREME COURT, U.S.
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No. 02-1593

In The Supreme Court of the United States

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL STONE, SAND & GRAVEL ASSOCIATION IN SUPPORT OF PETITIONERS AND URGING REVERSAL

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QUESTIONS PRESENTED

The Pittman Underground Water Act of 1919 (the "Pittman Act") authorized patents of up to 640 acres of Nevada land to applicants who discovered and successfully developed underground water sources. Pittman Act patents reserve all "coal and other valuable minerals" to the United States. The questions presented are:

(1) Whether the reservation of "valuable minerals" encompassed ordinary sand and gravel (or other ubiquitous common materials), worthless at the time of the patent, but which became marketable decades later as development created markets in reasonable proximity to such sand and gravel; and

(2) If *Watt v. Western Nuclear*, 462 U.S. 36 (1983), calls for a *per se* rule regarding the reservation (or non-reservation) of sand and gravel on land patented by the federal government in the early twentieth century, whether congressional intent would be better served by a rule that common materials such as sand and gravel are *not* reserved to the government as "valuable minerals."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY PROVISIONS INVOLVED	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. Sand and Gravel Were Not "Valuable Minerals" Intended to be Reserved to the United States Under the Pittman Act	7
A. *Western Nuclear* Does Not Govern the Decision in This Case	7
B. The Intention of Congress in 1919 Determines the Scope of the Reservation of Valuable Minerals Under the Pittman Act	8
1. The Scope of the Estate Conveyed and Reserved Under the Pittman Act Must Be Determined at the Time of the Grant	9
2. Congress Is Presumed to Have Been Aware of Existing Law, Common Law, and Contemporary Administrative Decisions Excluding Sand and Gravel From the Definition of the Term "Valuable Minerals"	10

TABLE OF CONTINUED – Continued

	Page
3. Contemporaneous Authorities, Including *Zimmerman* and its Progeny, Dictate That Sand and Gravel Were Excluded From the Definition of "Valuable Minerals" at the Time of the Pittman Act in 1919	13
II. Congress Did Not Intend that Sand and Gravel Be Developed Concurrently with the Surface of Pittman Act Lands or of Stock-Raising Homestead Act Lands	16
A. Sand and Gravel Could Not Have Been Developed Concurrently with the Surface as a Valuable Mineral in 1919	17
B. There Was No Congressional Intent to Develop Sand and Gravel as Minerals on Pittman Act Lands	18
III. The Maxim of Interpretation that "Nothing Passes Except What is Specifically Named" was Applied Incorrectly in this Case Below and in *Western Nuclear*	19
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999) 5, 9, 11

Andrus v. Charlestone Stone Products Co., 436 U.S. 604 (1978) 19, 20, 23, 24

Andrus v. Western Nuclear, 475 F. Supp. 654 (D. Wyo. 1979), *rev'd*, 664 F.2d 234 (10th Cir. 1981), *rev'd sub nom. Watt v. Western Nuclear*, 462 U.S. 36 (1983) 6

BedRoc Limited, L.L.C. v. United States, 314 F.3d 1080 (9th Cir. 2002) 7

Bob Jones University v. U.S., 461 U.S. 574 (1983) 12

Burke v. Southern Pacific R. Co., 234 U.S. 669 (1914) 11

Caldwell v. United States, 250 U.S. 14 (1919) 19, 20

Cannon v. University of Chicago, 441 U.S. 677 (1979) 11

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 11

Leo Sheep Co. v. United States, 440 U.S. 668 (1979) 9, 23

Morrison-Knudsen Const. Co. v. U.S. Dep't of Labor, 461 U.S. 624 (1983) 12

N.L.R.B. v. Amax Coal Co., 453 U.S. 322 (1981) 11

Northern Pacific R. Co. v. Soderberg, 188 U.S. 526 (1903) 19, 20, 21

TABLE OF AUTHORITIES – Continued

Page

Perrin v. United States, 444 U.S. 37 (1979) 10

Poverty Flats Land & Cattle Co. v. U.S., 788 F.2d 676 (10th Cir. 1986) ..... *passim*

Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) 11

South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938) 11

Traynor v. Turnage, 485 U.S. 535 (1988) 10, 11, 12

United States Dep't of Labor v. Perini North River Assoc., 459 U.S. 297 (1983) 12

United States v. Hess, 194 F.3d 1164 (10th Cir. 1999) 6, 19, 20, 22

United States v. Hess, No. 02-1220, filed September 30, 2002 6

United States v. Union Pacific R. Co., 353 U.S. 112 (1957) 19, 20, 21

Watt v. Western Nuclear, 462 U.S. 36 (1983) ..... *passim*

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND RULES

28 U.S.C. § 1254(1) 3

Act of July 1, 1862, 12 Stat. 489 21

Coal Act of 1909, 35 Stat. 844 (repealed 1976) 5

Coal Act of 1910, 36 Stat. 584 (repealed 1976) 5

Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785 6

Indian Reorganization Act, 25 U.S.C. § 465 6

TABLE OF AUTHORITIES – Continued

Page

Mining Act of 1872, 30 U.S.C. §§ 21 and 22 ..... *passim*

Pickett Act, 36 Stat. 847 (repealed 1976) 5

Pittman Underground Water Act of 1919, 78 Stat. 293 (repealed 78 Stat. 389 (1964)) ..... *passim*

Stock-Raising Homestead Act of 1916, 39 Stat. 862 (repealed 90 Stat. 2744 (1976)) ..... *passim*

Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. § 611 ..... 3, 17

MISCELLANEOUS

Castle v. Womble, 19 L.D. 455 (1894) 13

Earl Williams, 140 IBLA 295 (1997) 19

Eleanor Schwartz, *A Capsule Examination of the Legislative History of the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 285 (1979) 6

Hughes v. Florida, 42 L.D. 401 (1913) 10

Litch v. Scott, 40 L.D. 467 (1912) 10, 15, 16

Loren Mall, *Federal Mineral Reservations*, 20 ROCKY MTN. MIN. L. INST. 399 (1975) 6

LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN-DISPOSAL AND RESERVATION POLICIES 1900-1950 347 (Arno Press, New York 1972) 5

Pacific Coast Marble v. Northern Pacific R. Co., 25 L.D. 233 (1897) 9, 14

Richard Bate, *Mineral Exceptions and Reservations in Federal Public Land Patents*, 17 ROCKY MTN. MIN. L. INST. 326 (1972) 4

TABLE OF AUTHORITIES – Continued

Page

STEPHEN S. FULLER, THE IMPACTS OF THE CRUSHED STONE, SAND & GRAVEL INDUSTRY ON THE U.S. ECONOMY (National Stone, Sand & Gravel Association 2003) 1

Zimmerman v. Brunson, 39 L.D. 310 (1910) ..... *passim*

STATEMENT OF THE CASE[1]

The NSSGA is a nationwide trade organization whose membership represents ninety percent of the annual production of crushed stone and seventy-five percent of the annual sand and gravel production in the United States. During 2002, a total of about 2.73 billion metric tons of crushed stone, sand and gravel, valued at $14.6 billion, were produced in the United States. NSSGA's membership of approximately 800 companies includes major international corporations, regional operators, and small family-owned corporations extracting and selling product from a single location.[2] These entities have organized their business relationships on the basis of certain expectations, resting on a settled body of law governing ownership of sand and gravel in lands where the surface and mineral estates are severed.

Many NSSGA members operate on lands the title to which is descended from the various public lands acts of the late nineteenth and early twentieth century, including the Pittman Act at issue in the present case. The common

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[1] The parties have consented in writing to the filing of this brief. Copies of the parties' consents are being filed simultaneously with this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] Assertions concerning the scope and economic importance of the sand and gravel industry are derived from STEPHEN S. FULLER, THE IMPACTS OF THE CRUSHED STONE, SAND & GRAVEL INDUSTRY ON THE U.S. ECONOMY (National Stone, Sand & Gravel Association 2003). The pamphlet is available at www.NSSGA.org.

interest of all NSSGA members in this case lies in affirming a consistent rule of interpretation for mineral reservations, and opposing a ruling that would cause the retroactive transfer of ownership of sand and gravel from the owner of one estate to the owner of another by judicial reinterpretation of long-standing property relationships. Members have ordered their affairs, paid royalties, and made substantial capital investments in reliance on what they understood to be settled and predictable principles of property law. The Ninth Circuit's decision would upset those expectations, which would have profound consequences, the measure of which the Ninth Circuit could not possibly predict, for the surface owners potentially affected by this decision. The inability even to forecast such consequences provides a compelling reason to affirm a consistent, plain-language interpretation of mineral reservations in order to safeguard well-founded expectations and ensure the certainty of title held by NSSGA members, and other owners of split estates, across the western United States.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A, 1a-21a) is reported at 314 F.3d 1080. The opinion of the District Court for the District of Nevada (Pet. App. B, 22a-38a) is reported at 50 F. Supp. 2d 1001. The opinion of the Interior Board of Land Appeals (Pet. App. C, 39a-63a) is reported at 140 IBLA 295 (1997).

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 2002. On March 21, 2003, Justice O'Connor granted an extension of time to file a petition to April 30, 2003. The petition was filed timely and this Court granted a writ of certiorari on September 30, 2003. The Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

The Pittman Underground Water Act, 78 Stat. 293-95 (repealed 78 Stat. 389 (1964)) is set forth at Pet. App. D (64a-68a). Section 9 of the Stock-Raising Homestead Act of 1916, 39 Stat. 862 (repealed 90 Stat. 2744 (1976)), and Section 3 of the Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. § 611, are set forth at Pet. App. E and F (69a-71a).

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to revisit and strengthen a number of essential constructs with regard to the law of federal land patents and property law in general. Among these basic principles are the critical need to apply the plain language to effectuate the purposes of unambiguous legislation, the vital importance of construing the language of a property grant at the time of granting, and the fundamental significance of certainty of title. This Court should require the Department of the Interior ("Interior") to honor the promises it made decades ago, as those promises were intended at the time.

The Ninth Circuit's ruling misapplied fundamental principles of statutory construction. Statutory terms must be interpreted and applied according to their common meaning at the time the legislation was enacted. Congress is presumed to have known of that meaning and of the holdings of contemporaneous administrative decisions interpreting and applying the terms at issue.

In addition, the Ninth Circuit misapplied the maxim of interpretation that limits the scope of grants from the United States under the public lands laws by applying it to the reservation rather than to the grant.

ARGUMENT

In the early years of the Nation's westward expansion, the country's land disposal laws encouraged settlement and development by making it possible for individuals to acquire a tract by farming, building, and settling on it for a statutory period. Before 1909, the various land disposal laws passed by Congress distinguished between lands that were classified as "mineral in character" (that is, chiefly valuable for the production of minerals) and those that were non-mineral (deemed chiefly valuable for agriculture). Patents issued under the non-mineral classification statutes did not reserve minerals to the United States, but conveyed the full fee interest in the lands. *See, e.g.*, Richard Bate, *Mineral Exceptions and Reservations in Federal Public Land Patents*, 17 ROCKY MTN. MIN. L. INST. 326, 386-406 (1972).

In the first decade of the twentieth century, public concern grew over the apparently dwindling supply of coal available for production from the public lands. In particular,

there was public outrage over the large amounts of the public domain, particularly coal and oil-producing lands, that had apparently been fraudulently patented under the agricultural entry statutes. In response to these concerns, President Theodore Roosevelt withdrew millions of acres of land from entry under the homestead laws, and forced Congress to reform the system of land disposal acts. Congress responded by enacting laws requiring the reservation of specified minerals in patents issued by the United States. The earliest of these Acts, the Coal Act of 1909, 35 Stat. 844 (repealed 1976), and the Coal Act of 1910, 36 Stat. 584 (repealed 1976), reserved only the coal estate in favor of the United States. Those acts were soon followed by others which reserved additional minerals, including the Pickett Act, 36 Stat. 847 (repealed 1976), the Stock-Raising Homestead Act of 1916, 39 Stat. 862 (repealed 1976), and the Pittman Act. *See generally Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999).

Between 1805 and 1945, some 987 million acres of the public domain passed into private ownership. Of these, approximately 70.4 million acres were patented under the Stock-Raising Homestead Act, 16.2 million acres were patented under the Coal Acts of 1909 and 1910, and an additional 51 million acres were patented under the other land disposal acts, including the Pittman Act, that required or permitted the reservation of certain minerals to the United States.[3] Among the lands included in this last group were those at issue in this case.

[3] LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN-DISPOSAL AND RESERVATION POLICIES 1900-1950 347 (Arno Press, New York

(Continued on following page)

In 1976, Congress repealed most of the land disposal laws, and replaced the policy of disposal with one favoring retention and management of the public lands.[4] In implementing that policy since 1976, Interior has sought to establish a rule that sand and gravel, which were not considered to be minerals at the time the public land disposal laws were passed, were included in the reservation of minerals in patents issued under those Acts. The current case is part of that trend. *See, e.g., Andrus v. Western Nuclear*, 475 F. Supp. 654 (D. Wyo. 1979), *rev'd*, 664 F.2d 234 (10th Cir. 1981), *rev'd sub nom. Watt v. Western Nuclear*, 462 U.S. 36 (1983) (construing Stock-Raising Homestead Act of 1916); *Poverty Flats Land & Cattle Co. v. U.S.*, 788 F.2d 676 (10th Cir. 1986) (construing the Taylor Grazing Act); *United States v. Hess*, 194 F.3d 1164 (10th Cir. 1999) (construing the Indian Reorganization Act, 25 U.S.C. § 465).[5] In each case, Interior's policy goals have threatened the security of title of patentees and their successors by retroactively claiming reserved ownership of a significant component of the surface estate which had been presumed for decades to be a part of the original grant.

1972); Loren Mall, *Federal Mineral Reservations*, 20 ROCKY MTN. MIN. L. INST. 399 (1975).

[4] The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785. *See* Eleanor Schwartz, *A Capsule Examination of the Legislative History of the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 285 (1979).

[5] The Tenth Circuit remanded *Hess*. The District Court's decision on remand was reversed November 12, 2003. *United States v. Hess*, No. 02-1212 (10th Cir. filed Sept. 20, 2002).

In the present case, the lands at issue were designated by Interior as "non-mineral in character" in 1934 and made eligible for patent under the Pittman Act. BedRoc Limited's predecessor obtained a patent to these lands in 1940, a time in which no commercial market existed for this deposit of sand and gravel (although it was both evident and abundant in supply at the time of granting), because the lands were situated in the relative isolation of the Nevada desert. This state of affairs continued uninterrupted for more than five decades due to the remoteness of this tract of land from any infrastructure which would lend commercial viability to these otherwise valueless common materials. It was not until the early 1990s, when sand and gravel extraction operations first became profitable on these lands due to the expansion of Las Vegas, that Interior asserted – for the first time – its alleged right to the sand and gravel located on the property pursuant to the patent reservation of coal and other valuable minerals.

I. Sand and Gravel Were Not "Valuable Minerals" Intended to be Reserved to the United States Under the Pittman Act

A. *Western Nuclear* Does Not Govern the Decision in This Case

This case presents an important opportunity for the Court to revisit *Western Nuclear* and affirm the fundamental importance of certainty of title by ruling that sand and gravel were not "valuable minerals" *per se* in 1919. As argued in the Brief for Petitioners, the District Court and the Ninth Circuit improperly relied on *Western Nuclear* as a basis for its decisions in this case. *See BedRoc Limited,*

L.L.C. v. United States, 314 F.3d 1080, 1086-90 (9th Cir. 2002). *Western Nuclear* does not govern the determination of this matter for a number of reasons, including the fact that *Western Nuclear* concerned broader reservation language under the Stock-Raising Homestead Act of 1916. The central questions in this case – namely, the value of the specific gravel at issue and when that value should be determined – were neither raised nor decided in *Western Nuclear*.

B. The Intention of Congress in 1919 Determines the Scope of the Reservation of Valuable Minerals Under the Pittman Act

Unlike Section 9 of the Stock-Raising Homestead Act of 1916 – addressed in *Western Nuclear* – in which Congress reserved "all the coal and other minerals" to the United States, Section 8 of the Pittman Act contained a more limited reservation of "coal and other *valuable minerals*," requiring:

> That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

Pittman Act, § 8. Interior's claim in this case is for ownership of certain sand and gravel deposits that became valuable in the 1990s, more than fifty years after the

grant. The plain meaning of the word "valuable minerals," as used in the Pittman Act in 1919, did not include the sand and gravel at issue in this case because these minerals were not included within the contemporaneous definition of the term "mineral" when the Pittman Act was passed, and did not have intrinsic value either then or at the time of the grant.

In 1919, Interior used a two part test for determining whether something was a "valuable mineral deposit." First, the substance must have been "recognized as a mineral by the standard authorities," and second, it must have been present "in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes." *Pacific Coast Marble v. Northern Pacific R. Co.*, 25 L.D. 233, 244-45 (1897). Sand and gravel were not valuable minerals *per se* in 1919, nor is there evidence that this deposit would have been deemed valuable under the test.

1. The Scope of the Estate Conveyed and Reserved Under the Pittman Act Must Be Determined at the Time of the Grant

It is axiomatic that the scope of a conveyance of real property must be determined at the time of the grant. *See, e.g., Amoco Prod. Co.*, 526 U.S. at 873 ("The question is not whether, given what scientists know today, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910."); *Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) ("[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well

as the meaning of the particular provisions in it."). "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning . . . *at the time Congress enacted the statute* . . . ." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (emphasis added).

In this case Interior's contemporaneous interpretation of the term "minerals" answers the question of whether sand and gravel were included within the definition of the term "valuable minerals," as used by Congress in 1919. *See generally Zimmerman v. Brunson*, 39 L.D. 310 (1910); *Litch v. Scott*, 40 L.D. 467 (1912); *Hughes v. Florida*, 42 L.D. 401 (1913). As discussed below, Congress is presumed to have been aware of the contemporaneous decisions and interpretations of agencies charged with the enforcement of a relevant statute, and those decisions serve as an important interpretive tool for determining congressional intent.

2. Congress Is Presumed to Have Been Aware of Existing Law, Common Law, and Contemporary Administrative Decisions Excluding Sand and Gravel From the Definition of the Term "Valuable Minerals"

When interpreting statutes in their historical context this Court has consistently imputed to Congress the knowledge of contemporaneous legal decisions, administrative interpretations, and common usages of settled terms at the time of passage to assist in the determination of congressional intent. "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Traynor v. Turnage*, 485 U.S. 535, 546

(1988) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)); *see also South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 191 (1938) ("Being a legislative judgment it is presumed to be supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility.").

"Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).[6] With regard to statutory mineral reservations, this Court has previously "emphasized that Congress 'was dealing with a practical subject in a practical way' and that it intended the terms of the reservation to be understood in 'their ordinary and popular sense.'" *Amoco Prod. Co.*, 526 U.S. at 823 (quoting *Burke v. Southern Pacific R. Co.*, 234 U.S. 669, 679 (1914)).

Contemporaneous decisions and interpretations by the department charged with the enforcement of the statutes at issue have frequently been cited as a presumptive source of knowledge for purposes of determining congressional intent. For example, *Traynor* stated "we must assume that Congress was aware of the Veterans'

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[6] *See also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("[W]e are unwilling to assume that Congress was ignorant of the substantial number of States providing additional workers' compensation awards" in 1936 when the statute at issue was passed); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946) ("[I]n taking this action Congress must have had full knowledge of the nationwide existence of state systems of regulation and taxation. . . . Congress could not have been unacquainted with these facts. . . .").

Administration's interpretation of 'willful misconduct' at the time that it enacted §1662(a)(1), and that Congress intended that the term receive the same meaning for purposes of that statute as it had received for purposes of other veterans' benefits statutes." *Traynor v. Turnage*, 485 U.S. at 546. In *Morrison-Knudsen Const. Co. v. U.S. Dep't of Labor*, 461 U.S. 624, 632-33 (1983), this Court stated that its determination of congressional intent was aided by "the consistent policies of the agency charged with its enforcement." Similarly, in *Bob Jones University v. U.S.*, 461 U.S. 574, 590 (1983), this Court specifically relied upon the presumption of congressional knowledge of agency decisions, saying Congress had been made "acutely aware" of relevant Internal Revenue Service rulings for a dozen years before the legislation at issue was passed. Finally, in *United States Dep't of Labor v. Perini North River Assoc.*, 459 U.S. 297, 320 n. 28 (1983), this Court again affirmed the importance of contemporaneous agency interpretations, saying "[i]n order to withdraw coverage from employees, such as Churchill, who are maritime employees injured in the course of their employment upon the actual navigable waters, Congress would have had to ignore the consistent interpretation given the Act before 1972, by the Director [of the Department of Labor], the Deputy Commissioners, the courts, and the commentators."

In accordance with these important principles of statutory interpretation – that the scope of a statutory grant must be determined at the time of enactment of the statute, and that Congress is presumed to have knowledge of contemporaneous administrative interpretations for purposes of determining congressional intent – Interior decisions such as *Zimmerman* and its progeny are highly

relevant to the determination of whether Congress intended to include sand and gravel within the reservation of "valuable minerals" in 1919 when enacting the Pittman Act. These principles dictate that the term "valuable minerals" as used by the Congress in the Pittman Act does not include sand and gravel. In addition, to the extent that the majority decision in *Western Nuclear* was based upon the assumption that "it is most unlikely that many members of Congress were aware of the ruling in *Zimmerman*," 462 U.S. at 46, this Court's decision in *Western Nuclear* should be revisited.

3. Contemporaneous Authorities, Including *Zimmerman* and its Progeny, Dictate That Sand and Gravel Were Excluded From the Definition of "Valuable Minerals" at the Time of the Pittman Act in 1919

Contemporaneous legal decisions, administrative interpretations by Interior, and the common usage of the term in 1919 all support the conclusion that sand and gravel were excluded from the definition of "valuable minerals" when the Pittman Act was passed. To determine whether materials were "valuable mineral deposits" under the Mining Act of 1872, 30 U.S.C. sections 21 and 22, Interior relied on the tests set forth in *Castle v. Womble*, 19 L.D. 455, 457 (1894):

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable

> mine, the requirements of the statute have been met;

and in *Pacific Coast Marble*:

> The Department, . . . adheres to the rule: That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

Pacific Coast Marble v. Northern Pacific R. Co., 25 L.D. 233, 244-45 (1897).

With these tests in mind, Interior decided *Zimmerman v. Brunson* in 1910. In that case, Zimmerman contested the validity of Brunson's entry under the Homestead Act, arguing that the land was valuable for its gravel deposits. Interior considered the question of whether the presence of sand and gravel deposits could render lands "mineral in character," that is, more valuable for production of minerals than for agriculture, and thus closed to homestead entry. Relying upon the tests set forth above, Interior made the following determination:

> A search of the standard American authorities has failed to disclose a single one which classifies a deposit such as claimed in this case as mineral, nor is the Department aware of any application to purchase such a deposit under the mining laws. This, taken into consideration with the further fact that deposits of sand and gravel occur with considerable frequency in the public domain, points rather to a general understanding

> that such deposits, unless they possess a peculiar property or characteristic giving them a special value, were not to be regarded as mineral.

Zimmerman v. Brunson, 39 L.D. 310, 312 (1910). After reviewing a series of other Interior Decisions, the Secretary concluded:

> From the above resume it follows that the Department, in the absence of specific legislation by Congress, will refuse to classify as mineral land containing a deposit of material not recognized by standard authorities as such, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain.

Id. at 313. This decision was followed by *Litch v. Scott*, 40 L.D. 467, 469 (1912), where Interior found that land that was "almost entirely sand and gravel, and [from which] said Scott is selling gravel continuously," was not mineral in character.

Thus, almost a decade before the Pittman Act was passed in 1919, Interior's stated policy was that sand and gravel was not regarded as a mineral unless the particular deposit possessed a "peculiar property or characteristic" which gave it special value. *Zimmerman*, 39 L.D. at 312. Moreover, six years prior to the passage of the Pittman Act, Interior clarified that sand and gravel were not considered mineral in character even where a market was available and it had actually been removed for sale. *Litch*, 40 L.D. at 469. Given Interior's *per se* rule classifying lands from which sand and gravel were actually being sold in 1912 as non-mineral, it is difficult to imagine anything but the same conclusion regarding the deposit of sand and

gravel at issue in this case, for which no commercial market existed when the Pittman Act was passed in 1919, nor for more than seventy years thereafter.

II. Congress Did Not Intend that Sand and Gravel Be Developed Concurrently with the Surface of Pittman Act Lands or of Stock-Raising Homestead Act Lands

Sand and gravel were not locatable in 1919 under the Mining Act of 1872. As a result the Ninth Circuit's imputed purpose of the mineral reservation in the Pittman Act, concurrent development of surface and subsurface resources, could not have been accomplished by including sand and gravel in the reservation of "valuable minerals." This rationale was also relied on to justify the holding of *Western Nuclear*. This Court stated there that "[s]imply as a matter of consistent interpretation of statutes concerning the same subject matter, if gravel deposits constituted 'mineral deposits' that could be located under the mining laws, then presumptively gravel should constitute a 'mineral' reserved to the United States under the SRHA." *Western Nuclear,* 462 U.S. at 59. The discussion in Section I, above, makes it clear that sand and gravel deposits were not "mineral deposits" at the time of enactment of the Pittman Act or of the Stock-Raising Homestead Act. Interior's policy was to treat these deposits as non-mineral; *Zimmerman* and *Litch* indicate that common gravel deposits would not have supported a mineral entry under the Mining Act of 1872.

A. Sand and Gravel Could Not Have Been Developed Concurrently with the Surface as a Valuable Mineral in 1919

The *Western Nuclear* majority reasoned that:

> [s]ince Congress intended to facilitate development of both surface and subsurface resources, the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated. . . . The reservation of minerals to the United States should . . . be construed by considering the purposes both of the grant and of the reservation in terms of the use intended.

Western Nuclear, 462 U.S. at 52 (citation and internal quote omitted). However, the majority failed to take note of the fact that the Court's stated purpose for reserving minerals, to promote their development apart from grazing uses of the surface, was not achievable with respect to sand and gravel when the Stock-Raising Homestead Act (and the Pittman Act) were passed. Sand and gravel were not locatable under the Mining Act at that time, nor was there a legal mechanism at that time by which a person could obtain the right to develop sand and gravel on Stock-Raising Homestead Act or Pittman Act patented lands.

In *Poverty Flats*, the Tenth Circuit pointed out that BLM could not treat caliche as a "mineral" for purposes of the reservation from the grant, and simultaneously dispose of it as a "material" under the Surface Resources Act of 1955, 30 U.S.C. section 611. *Poverty Flats Land & Cattle Co. v. U.S.*, 788 F.2d 676, 679-80 (10th Cir. 1986). Congress knew in 1916 that sand and gravel were not "minerals," and this Court in *Western Nuclear* incorrectly

concluded in 1983 that there was a legislative intent in 1916 to promote the development of sand and gravel under the Mining Act simultaneously with settlement of the surface. The record of numerous contemporaneous decisions shows that there was no provision in the Mining Act for doing so. The same reasoning applies with respect to the Pittman Act. There was no intent in 1916 (or in 1919) to promote the development of the surface simultaneously with the development of sand and gravel as "valuable minerals." Sand and gravel were not minerals for purposes of entry under the Mining Act, and there was no legal means by which to exploit them as materials.

B. There Was No Congressional Intent to Develop Sand and Gravel as Minerals on Pittman Act Lands

Moreover, in contrast to the Stock-Raising Homestead Act, the Pittman Act required that the Secretary of the Interior determine lands to be "nonmineral" before they were open for entry. Section 1 of the Pittman Act, 78 Stat. 293 (repealed 1964), provided that the Secretary was to grant a permit on "unreserved, unappropriated, nonmineral, nontimbered lands." Section 2 of the Stock-Raising Homestead Act authorized the Secretary to:

> designate as stock-raising lands subject to entry under this Act lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation . . . and are of such character that six hundred and forty acres are reasonably required for the support of a family. . . .

39 Stat. 862 (repealed 1976). Thus, while the Stock-Raising Homestead Act did not require the lands be classified as mineral or non-mineral, the Pittman Act did require exclusion of mineral lands. Congress clearly intended that lands available for entry under the Mining Act of 1872 were to be excluded from entry under the Pittman Act, and were not anticipated to be developed simultaneously as grazing and mineral lands.

III. The Maxim of Interpretation that "Nothing Passes Except What is Specifically Named" was Applied Incorrectly in this Case Below and in *Western Nuclear*

In holding that sand and gravel were reserved as minerals from Pittman Act patents, the Interior Board of Land Appeals ("IBLA") in this case relied on an old maxim of interpretation: "the established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Earl Williams*, 140 IBLA 295, 314 (1997) (citing *Western Nuclear*, 462 U.S. at 59 (quoting *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957)); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978); *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919); *Northern Pacific R. Co. v. Soderberg*, 188 U.S. 526, 534 (1903)). This maxim is frequently invoked by Interior in cases involving the scope of grants from the United States, such as *Hess* and *Poverty Flats*.

This approach is not well suited for interpreting mineral reservations, however, and its invocation should not dictate the outcome in this case. First, as demonstrated above, the commonly accepted definition of "minerals," and

prevailing Interior policy at the time, indicate that Congress did not consider sand and gravel to be "valuable minerals" subject to reservation when the Pittman Act was passed. "The relevant intent of Congress is that existing at the time the statute was enacted." *Western Nuclear*, 462 U.S. at 62 (citing *Charlestone Stone Products Inc.*, 436 U.S. at 611). The maxim that ambiguity should be resolved in favor of the government does not carry the day in this case; there is no ambiguity of congressional intent on which to invoke it. Second, the application in this case of the principle that "nothing passes except what is conveyed in clear language, and if there are doubts they are resolved for the Government," would lead to manifest injustice, as it did in *Western Nuclear* and as it threatened to do in *Poverty Flats* and *Hess*. The doctrine is well suited for interpreting *grants*, but when it is applied to *mineral reservations* the exception swallows the grant.

Grants of land are made in general terms, while reservations are specifically made. The issue in this case, as it was in *Western Nuclear*, *Hess*, and *Poverty Flats*, is whether "valuable minerals" means "everything that could ever become valuable whether now or in the future." It is different than the issues presented in *Caldwell*, *Northern Pacific R. Co.*, and *Union Pacific R. Co.*, where the maxim received its early formulation and application to the interpretation of federal grants.

In *Caldwell v. United States*, the issue was the scope of a license to a railroad company of the right to use "timber necessary for the construction of said railroad" felled from the right of way on which the road was constructed. *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919). The company argued that "timber" included slash and other lumber, that is, everything that resulted from

taking the trees; the Court held that the term "timber necessary for the construction of said railroad" was not a grant of trees, but of timber actually used for railroad construction, by the maxim that "grants must be construed favorably to the government and that nothing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the government." *Id.* Although the railroad was not allowed to sell the slash and other lumber, there was no question that it was allowed to use timber for construction.

In *Northern Pacific R. Co. v. Soderberg*, the Court considered whether certain lands were included in a statutory land grant to the railroad, which by its terms did not include minerals lands. *Northern Pacific R. Co. v. Soderberg*, 188 U.S. 526, 534 (1903). If the lands were mineral they could not be part of the land grant. The question was whether the term "valuable minerals" was limited to metallic ores, or included a deposit of granite suitable for use as a building stone. There was no split estate issue presented; the issue for the Court was whether the railroad received title to the land or the United States kept it open to entry under the Mining Act of 1872. The Court found the term "valuable mineral deposit" to be not limited to metallic minerals, found granite to be included in the term, and the lands at issue were mineral lands and therefore not included in the railroad land grant. *Id.*

In *United States v. Union Pacific R. Co.*, the United States sought to enjoin the railroad from drilling for oil and gas in the right of way that had been granted to it by Section 2 of the Act of July 1, 1862, 12 Stat. 489, 491. *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957). The Act granted a right of way for the actual route.

It also gave the railroad every alternate section on each side of the road, but reserved mineral lands from the grant. It did not explicitly except minerals from the right of way. The Court held that the grant of a right of way was limited to the use of the surface for railroad purposes, and that the congressional intent to reserve minerals (in that case, oil and gas) under the right of way was demonstrated by the fact that Congress excepted all mineral lands from the grant of alternate sections. *Id.* There was no issue of whether or not oil and gas were "minerals" for purposes of the reservation.

None of these cases addressed the issue presented by *Hess*, *Poverty Flats*, *Western Nuclear*, and this case. Where the substance in question makes up the whole of the surface, as sand and gravel do in this case, the application of the maxim that "grants must be construed favorably to the government and that nothing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the government," if literally applied, would negate the entire grant. Reserving sand and gravel as a mineral would leave the putative owner with nothing except a bare license to use the surface, until the United States permits someone to come in, develop sand and gravel under the Materials Act, and destroy it. By invoking this maxim to try to bring sand and gravel within the scope of the reservation, the Government attempts to use an inapposite guide to interpretation and an alleged ambiguity to expand the reservation of "minerals," so much so that the holders of bona fide patents risk having their entire property destroyed. This cannot have been the intent of Congress. The better rule was articulated in *Poverty Flats*:

> New BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then prevailing practice and decisions. The result otherwise would be a progressive series of changes dependent on the changes in the views of the officials or changes in personnel.

Poverty Flats, 788 F.2d at 683. As the court recognized, property owners require security of title so as to be able to order their affairs with reasonable certainty.

> Much has been said about the stability of titles and the Court in a case concerning such new views on the reservation of rights of way said in *Leo Sheep Co. v. United States*, 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677: 'Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. . . . This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.' The Court in *Leo Sheep Co. v. United States*, reached such a conclusion after citing *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570, and stating the doctrine that when grants of federal lands are in issue doubts are resolved for the Government not against it.

Poverty Flats, 788 F.2d at 683.

The Court's reasoning in *Charlestone Stone Products* is also instructive:

> The fact that water may be valuable or marketable . . . is not enough to support a mining claim's validity based on the presence of water. Many substances present on the land may be of value. . . . In order for a claim to be valid, the substance discovered must not only be a "valuable mineral" within the dictionary definition of those words, but must also be the type of valuable mineral that the 1872 Congress intended to make the basis of a valid claim.

Charlestone Stone Products, 436 U.S. at 611.

The instant case does not involve the Mining Act of 1872, however, the definition of "valuable mineral" for the purposes of that Act sheds light on the meaning of that term as used in the Pittman Act. This Court in *Charlestone Stone Products*, and the Tenth Circuit in *Poverty Flats*, correctly perceived that a careful reading of congressional intent, contemporaneous meaning, and common sense were required. This case calls for no less.

NSSGA members across the western United States look to a settled interpretation of statutory terms on which to order their commercial affairs. Retroactive interpretations of statutory reservations made early in the twentieth century threaten the settled expectations of innumerable property owners in the twenty-first century, including NSSGA members. This Court should promote security and stability of title to lands patented under the federal public lands statutes, and hold that sand and gravel are not included as a matter of law in the term "valuable minerals," where that term is part of a reservation of minerals to the United States under the Pittman Act.

CONCLUSION

Amicus Curiae requests that this Court reverse the judgment of the Ninth Circuit, and overturn *Western Nuclear*.

Respectfully submitted,

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